United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7386

B

P/S

In the

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 75-7386

IN RE MASTER KEY ANTITRUST LITIGATION

(All Cases)

M.D.L. Docket No. 45

On Appeal From The United States District Court
For The District Of Connecticut
Honorable M. JOSEPH BLUMENFELD, *Judge Presiding*

BRIEF OF PLAINTIFFS-APPELLEES

LEE A. FREEMAN, JR.
Co-Liaison Counsel for
Plaintiffs-Appellees

FREEMAN, FREEMAN & SALZMAN
One IBM Plaza—Suite 3200
Chicago, Illinois 60611

(List of Counsel for these Plaintiffs-Appellees continued on inside cover)

The Scheffer Press, Inc.—(312) 263-6850

H. LADDIE MONTAGUE, JR.
Co-Liaison Counsel for
Plaintiffs
1622 Locust Street
Philadelphia, Pennsylvania

WILLIAM J. SCOTT
Attorney General of Illinois
John P. Meyer
Special Assistant Attorney
General

THEODORE L. SENDAK
Attorney General of Indiana
John F. Beckman, Jr.
Special Assistant Attorney
General

FRANK J. KELLEY
Attorney General of Michigan
Edwin M. Bladen
Frederick H. Hoffecker
Assistant Attorneys General

WARREN R. SPANNAUS
Attorney General of Minnesota
Thomas R. Muck
Special Assistant Attorney
General

ROBERT P. KANE
Attorney General for the
Commonwealth of Pennsylvania
Gerry J. Elman
Deputy Attorney General

CHAUNCEY H. BROWNING, JR.
Attorney General of West
Virginia
Gene Hal Williams
Deputy Attorney General

BRONSON C. LA FOLLETTE
Attorney General of Wisconsin
Marvin I. Strawn
Assistant Attorney General

EVELLE J. YOUNGER
Attorney General of California
William S. Abbey
H. Chester Horn, Jr.
Deputy Attorneys General

CARL R. AJELLO
Attorney General of Connecticut
Norris L. O'Neill
Special Assistant Attorney
General

CURT T. SCHNEIDER
Attorney General of Kansas
Reid F. Holbrook
Special Assistant Attorney
General

WILLIAM F. HYLAND
Attorney General of New Jersey
Bruce R. Volpe
Deputy Attorney General

ADRIAN P. BURKE
Corporation Counsel of New York
Melvin L. Ortner
Assistant Corporation Counsel

LOUIS J. LEFKOWITZ
Attorney General of New York
John M. Desiderio
Joseph D. Landi
Assistant Attorneys General

WILLIAM J. BROWN
Attorney General of Ohio
Ronald I. Wiseman
Assistant Attorney General

I N D E X

TABLE OF CASES

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 75-7386

IN RE MASTER KEY ANTITRUST LITIGATION

(All Cases)

M.D.L. Docket No. 45

BRIEF OF PLAINTIFFS-APPELLEES

STATEMENT OF THE CASE

This is an appeal from the trial court's refusal to decertify class actions that have been pending for five years, during which time the parties have engaged in extensive discovery to prepare these cases for trial.

This litigation involves nineteen treble damage actions for public entities and private builders, which have been filed throughout the country, against the four full-line manufacturers of builders hardware: Emhart Corporation (which sells through its Russwin and Corbin Division); Sargent & Company; Eaton, Yale & Towne, Inc. (now Eaton Corporation) and Ilco Corporation.*/ Pursuant to motions by defendants

*/ There are two national class actions; fourteen state-wide class actions; and three non-class actions brought by the State of New Jersey, City of New York and Sturdy Home Builders. (See D. Br. 5-6)

under 28 U.S.C. §1404(a) and §1407, these were transferred and consolidated in the District of Connecticut before Judge M. Joseph Blumenfeld. These plaintiffs charge the same nationwide conspiracy and antitrust violations; the discovery by the parties applies to all cases.

ISSUES PRESENTED

1. Whether there is appellate jurisdiction to review the District Court's non-final rulings that the pending class actions should remain certified and that the cases, upon completion of coordinated discovery under §1407, should be consolidated for an initial trial of the common liability issues.

2. Whether, if the merits are considered, the District Court abused its discretion by finding that common questions predominated for purposes of Rule 23 and that separation of the liability and damage issues in a consolidated proceeding under Rule 42 was the fairest and most efficient procedure to resolve this litigation.

COUNTERSTATEMENT OF FACTS

Defendants' self-serving description as to the marketing of contract hardware (D. Br. 10-14) contains numerous inaccuracies which will be disproved at trial. Most significantly, though, the evidence shows that defendants have illegally conspired to fix list prices and eliminate price competition; this unlawful conduct presents common questions that cut across the alleged variations in the sale of contract hardware.

The nature of the industry, the conspiracy, and its impact upon plaintiffs may be briefly outlined. (See Plaintiffs' Designation of Evidence with Respect to Trial of Liability Issues, Jt. App. (II), pp. 339A-523A).

The term "contract hardware" refers to builders hardware sold on a contract basis for use in construction of schools, hospitals, office buildings, hotels and other buildings. Defendants are the only full line manufacturers of contract hardware used for door openings, such as lock sets, latch sets, hinges, exit devices and closers. They sell contract hardware exclusively through authorized dealers, who are allowed to represent only one defendant. Contract hardware dealers normally do not maintain sufficient inventory for contract hardware jobs; they submit bids on the hardware for a building as a package, and then order the different items when awarded the contract.

A master key system refers to an interrelated system of locks designed for a particular building or complex of buildings whereby each lock may be opened by its own distinct key, but all locks in a given system may be opened by a master key. Defendants maintain records regarding the keying configurations on all building projects that have master key systems with their brand of hardware.

Defendants conspired to fix and maintain the prices of contract hardware at non-competitive levels by meetings, communications, and the exchange of information regarding prices among the highest sales executives of defendants. Moreover, defendants agreed to eliminate competition

on master key systems and, accordingly, prohibited their dealers from selling contract hardware for use on a building or group of buildings having another manufacturer's master key system. For this purpose, defendants adopted general sales policies against bidding on another manufacturer's master key system.

Defendants reinforced their horizontal conspiracy to protect master keys from competition, and to keep prices at artificially high levels, by separate illegal arrangements to allocate master key systems and territories among their own dealers and by the prohibition against dealers reselling (or bootlegging) contract hardware to other dealers. Consequently, defendants effectively prevented all competition — interbrand and intrabrand — in the sale of contract hardware for master key projects.

Defendants knew their agreements to prevent competition were illegal. Consequently, they sought to conceal the conspiracy by enforcing restraints against dealers on a verbal basis, by arranging for the submission of collusive (or complimentary) bids, and by misrepresenting their sales policies to public agencies.

The dealers readily agreed to the restraints on their activities because they, in turn, were protected from interference by other dealers on their own master key systems. Defendants, however, closely policed adherence to the industry-wide understanding against competition on master key jobs and took the necessary measures to enforce the conspiracy. In the relatively infrequent instances that dealers violated the prohibitions against competing on master keyed jobs, defendants "convinced" them to withdraw their bids; refused to supply them with contract hardware;

required them to compensate the protected dealer for lost profits; threatened them with termination or terminated them as authorized contract hardware dealers; and initiated disciplinary action in the American Society of Architectural Hardware Consultants ("ASAHC"), the industry's trade association.

Because defendants maintain keying records, they can identify and stop orders from unauthorized dealers for locks and cylinders related to an existing master key system. By refusing to sell these items to anyone other than the "protected" dealer, defendants can control which dealer supplies all the contract hardware for a particular project.

As a result of the conspiracy, the defendants maintained their prices for contract hardware above competitive levels, defendants refused to give discounts on master keyed jobs, and dealers put artificially high mark-ups on the contract hardware sold for construction projects with master key systems. Plaintiffs thus paid far more for contract hardware than the prices that would have prevailed absent defendants' illegal agreements and actions to restrain competition. Since contract hardware is bid as a package, the conspiracy operated to inflate the prices of related hardware manufactured by non-defendants that was included in master keyed jobs. The sales of contract hardware by defendants alone exceed $500 million for the years 1960 to 1970.

THE RULINGS BY THE TRIAL COURT

In an effort to create a basis for interlocutory review, defendants mischaracterize the procedural rulings below. The District Court's decision reaffirms classes certified over five years ago in

City of Philadelphia v. Emhart Corp., 50 F.R.D. 232 (E.D. Pa. 1970).*/ Judge Blumenfeld determined that the nation-wide conspiracy issues presented common questions of law and fact which predominated over the individual questions with respect to the amount of damages; that trial of these issues in the pending class actions would be manageable; that the liability issues should properly be separated from damage issues for trial; and that the classes could be redefined if necessary for subsequent damage hearing. In re Master Key Antitrust Litigation, 1975 Trade Cas. ¶60,377 (D. Conn. 1975).

Judge Blumenfeld first defined the type of conspiracy charged by plaintiffs and its effect:

> First, they claim a conspiracy among the four defendants to fix prices. Second, they claim that a horizontal conspiracy existed among the defendants to eliminate inter- and intra-brand competition among their dealers, thus keeping prices above competitive levels. This conspiracy was allegedly implemented by a series of illegal vertical restrictions. The damage claims arise from the horizontal, not the vertical, conduct. Thus the plaintiffs plan to prove illegal vertical restrictions upon the dealers only to demonstrate by implication the existence of a horizontal conspiracy among the defendants to reduce competition (and thus maintain prices above the competitive level) at the dealer level. (1975 Trade Cas. ¶60,377 at p.66,637 n.1).

With reference to the liability trial, the District Court ruled that plaintiffs would have to prove the antitrust violations and their anti-competitive effect:

---

*/ Judge Blumenfeld modified the prior class action orders to the extent that the certified state-wide class actions on behalf of public entities represented by their respective attorneys general.

> In these cases the common questions are certainly central at least on the issue of liability. The plaintiffs' claims all go to group conduct by the defendants. It is true, as the defendants urge, that there may be local variations in marketing practices and the like. It is also true that in order for all the plaintiffs to recover it must be shown that the effects of the defendants' alleged anti-competitive behavior extended to all the areas in which plaintiff made master key purchases. But these facts do not change the central and common element of these cases — the question whether the defendants acted in concert to decrease competition among them. If this element is shown, differences in the way the plan was manifested around the country are unimportant, except perhaps as they may affect the amounts of recovery different plaintiffs may obtain. (1975 Trade Cas. ¶60,377 at pp.66,637-66,638).

Judge Blumenfeld expressly reserved decision on the appropriate procedures for determination of damages, if that became necessary, noting that "decertification or certification of different classes remains possible." 1975 Trade Cas. ¶60,377 at p.66,639.

By order filed August 11, 1975, the trial judge refused to certify his ruling under Section 1292(b) on the ground that it would be "merely dilatory to permit an interlocutory appeal." Ruling on Motion for Certification of Interlocutory Appeal. (Jt. App. (I) p.167A.)

SUMMARY OF ARGUMENT

Defendants seek review of discretionary rulings by the District Court that are not final. Their papers demonstrate no reason to entertain the appeal, much less disturb the rulings below.

The defendants' extended description of alleged competition in the contract hardware industry (D. Br. 10-14, 22-24, 31-38) goes to the heart of the merits — these are factual issues for the jury to decide.

Moreover, their contentions misconstrue the evidence, what plaintiffs intend to prove, and the elements required for a liability determination.

The liability trial will establish whether defendants have violated the antitrust laws and whether their unlawful acts had an adverse effect upon competition and prices for contract hardware. If prejudicial error were to occur in this trial, or if the proof is insufficient to sustain a jury verdict against defendants, they may appeal from that judgment; their rights are thus fully protected.

The law is well-settled that the issues of liability and damages may be separated where the complaints, as here, allege illegal agreements and concerted action to fix prices or to maintain prices by suppressing competition. This has been ordered in numerous recent antitrust class actions. E.g., Gypsum Wallboard Antitrust Litigation , No. 46414-A (N.D. Cal.); Automobile Fleet Discount Cases, M.D.L. Docket No. 65 (N.D. Ill.); Cast Iron Pipe Antitrust Cases, CA 71-516 (N.D. Ala.). These decisions cannot be distinguished; indeed, defendants don't even mention them.

Defendants simply reiterate the general elements for recovery of damages under Section 4 of the Clayton Act, quoting at length from decisions that were concerned with standing of competing manufacturers and distributors to sue for "incidental" harm to their businesses that allegedly resulted from otherwise unrelated antitrust violations. Those decisions have no application to suits by purchasers for overcharges that resulted from a price-fixing conspiracy.

The fact remains that defendants will not have to pay any plaintiff until damages are established. The appropriate procedure for proof of damages has not yet been determined by the trial court. In

these circumstances, defendants' complaints ring hollow.

There is neither jurisdiction nor legal basis for this Court to intrude in the proceedings below. These cases should be returned to the District Court for trial of the liability issues as the next step toward final resolution of this litigation.

ARGUMENT

I. THE APPEAL MUST BE DISMISSED BECAUSE THE ORDERS BELOW ARE NOT FINAL

The certification of classes fails to meet any of the prerequisites for interlocutory appeal enunciated in Kohn v. Royall, Koegel & Wells, 496 F.2d 1094 (2d Cir. 1974); General Motors Corp. v. City of New York, 501 F.2d 639 (2d Cir. 1974); Parkinson v. April Industries, Inc., Fed. Sec. L. Rep. ¶95,227 (2d Cir. 1975); and Handwerger v. Ginsberg, Fed. Sec. L. Rep. ¶95,241 (2d Cir. 1975). The related procedural determinations have traditionally been entrusted to the broad discretion of the trial court; this discretion was exercised on the basis of evidence assembled during four years of extensive pretrial discovery. These rulings are clearly not appealable.

A. The Refusal to Set Aside Classes Previously Established in this Litigation is Not a Proper Subject for Appellate Review

In Kohn and subsequent recent decisions, this Court has set forth three prerequisites for interlocutory appeal of a class action determination:

(1) whether class action standing is "fundamental to the further conduct of the case";

(2) whether review of that order is "separable from the merits";

(3) whether that order will cause "irreparable harm to the defendants in terms of time and money spent in defending a huge class action ...." 496 F.2d at 1098.

As this Court recently stressed in Parkinson, Fed. Sec. L. Rep. ¶95,227 at p. 98,196, these elements should be interpreted "most restrictively" to further the "sound policies of finality."*/

1. Class Action Certification is Not "Fundamental to the Further Conduct of the Case"

This first requirement has not been met because the named plaintiffs, who include the States of Illinois, Indiana, West Virginia, California, Ohio, Wisconsin, Minnesota, Michigan, Connecticut, New York, Florida, Kansas, Colorado, and the Commonwealth of Pennsylvania, can "reasonably be expected to continue their actions in [their] individual capacities." Kohn, 496 F.2d at 1099. Indeed, the cases filed by the State of New Jersey and New York City are not class actions; those two plaintiffs directly represent individual public entities in their jurisdictions.

This case is closely analogous to General Motors, where the grant of class action status was held not "fundamental" because the City of New York's claim was large enough to guarantee that it would have prosecuted the case in its individual capacity. 501 F.2d at 645.

---

*/ Judge Friendly, concurring in Parkinson, would only review class action determination under Section 1292(b). The observations by Judge Waterman in Parkinson have special relevance to this litigation:

> Moreover, the finality rule ... is an important tool in maintaining the appropriate relationship between appellate and district courts and in preserving the respective functions of each. The opportunity given the reviewing court to view the entire controversy with the perspective the completed proceedings provides enhances the likelihood of sound review.... At p. 98,191.

2. Review of the Class Action Rulings Would Involve the Merits of Plaintiffs' Claims

Defendants premised their motion to decertify the class actions (and their opposition to separation of liability and damage issues) upon allegations that many factors affected each sale of contract hardware, and consequently individual questions regarding damages would overwhelm the common issues and make trial of multi-party claims impossible. On the contrary, the evidence shows an illegal agreement and concerted action by defendants and their dealers to fix prices and to stabilize prices by the elimination of competition on master keyed jobs. "In resolving these countervailing situations, the judgment of the trial judge should be given the greatest respect and the broadest discretion, particularly if, as here, he has canvassed the factual aspects of the litigation." City of New York v. International Pipe & Ceramics Corp., 410 F.2d 295, 298 (2d Cir. 1969).

The arguments advanced by defendants actually go to the existence of a conspiracy, raising matters that must be resolved at trial. Review of Judge Blumenfeld's procedural rulings would force the Court of Appeals into the heart of the merits. These issues should only be considered after a possible jury verdict against defendants.

In General Motors, Judge Carter sustained a national class action, ruling that common issues regarding liability predominated over questions that concerned the "varying nature or amount of damages," and liability issues should be separated from damages. 501 F.2d at 643.

This Court dismissed an appeal by defendant, for reasons that apply with equal force here:

> [R]eview of the court's class action determination would take us far into the merits of the City's antitrust claim that GM has monopolized or attempted to monopolize a nationwide market in the manufacture and sale of city buses. GM, for example, vigorously disputes the district court's conclusion that proof of monopolization or attempted monopolization will present common questions of law or fact that will predominate over individual proof of damages.... A mere recitation of these factors demonstrates their obvious relationship to the very issues critical to the success of the City's underlying antitrust claim. Thus, we are asked at this preliminary stage in the litigation to undertake the difficult though eventually avoidable task of product and geographic market definition, simply to determine whether evidence submitted in the course of this definitional process will be common or individual in nature. The redundancy of effort and consequent waste of judicial resources must be apparent; accordingly, we shall not belabor the point. 501 F.2d at 654.

Similarly, the way that defendants' conspiracy affected the price levels of contract hardware for master keyed projects depends upon the evidence. Just as in Kohn, review of defendants' contentions would force the Court of Appeals "to examine not only the factual strength but the legal relevancy" of plaintiffs' proof regarding the conspiracy and its effect on prices. How plaintiffs were affected by the conspiracy "is inextricably intertwined with the ultimate merits." 496 F.2d at 1100.

3. The Class Action Orders Will Not Cause Defendants "Irreparable Harm"

Continued prosecution of this litigation on behalf of absent class members will not cause the type of "irreparable harm" required for appeal. First, plaintiffs will bear the costs of notice. Second,

discovery on the liability issues is virtually complete and the cases are ready for trial. The plaintiffs have already reviewed more than 50,000 documents, conducted approximately fifty depositions, designated their evidence for trial, and filed a pretrial brief. Third, even were class certification denied, almost identical evidence would be required at separate trials by the respective plaintiffs to show that the illegal conspiracy operated to eliminate competition and raise prices throughout the country. The same reasons led this Court to hold appeal improper in General Motors. Since plaintiffs' claims of nationwide price-fixing and restraints on competition "will, even absent class action status, sustain broad discovery and evidentiary admissibility at trial as to alleged national predatory practices, the incremental cost of defending this action as a class action should not be significant." 501 F.2d at 646. See also Handwerger, slip. op. at 4868.

Finally, the class actions are subject to redefinition, depending on the nature and extent of proof offered during the liability trial. Judge Blumenfeld stressed that "decertification or certification of different classes remains possible for whatever damage determination may be called for at a later date." 1975 Trade Cas. at p. 66,639. The trial court has thus assumed responsibility to modify class action procedures to the extent required by "disparate proof." General Motors, 501 F.2d at 647; Handwerger, slip. op. at 4869.

The position taken by this Court of Appeals has been echoed recently in other circuits. Seiffer v. Topsy's International, Inc., Fed. Sec. L. Rep. ¶95,251 (10th Cir. 1975); In Re Cessna Aircraft

Distributor Antitrust Litigation, 1975 Trade Cas. ¶60,376 at p. 66,636 (8th Cir. 1975); and Arizona Bakery Products Litigation, No. 75-1865, noted in CCH Trade Cas. No. 187 (July 28, 1975).

Defendants misplace reliance upon the "collateral" order doctrine enunciated in Cohen v. Beneficial Loan Corp., 337 U.S. 541 (1949), and the decisions in Eisen v. Carlisle & Jacquelin, 479 F.2d 1005 (2d Cir. 1973)(Eisen III), and Herbst v. ITT Corp., 495 F.2d 1308 (2d Cir. 1974). The subsequent decisions of the Second Circuit in Kohn, General Motors, Parkinson and Handwerger have sharply limited the holdings in Eisen III and Herbst to their own facts.*/ As stressed in Papilsky v. Berndt, 503 F.2d 554, 556 (2d Cir. 1974):

> Cohen and its progeny are all distinguishable because they represented denial of collateral rights which would be forever lost unless the orders were immediately reversed.

---

*/ Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) (Eisen IV), was limited to review of the "collateral" question whether defendants could be required to pay the initial costs of notice under Rule 23. The Supreme Court vacated the Eisen III decision in all other respects, holding that it had:

> [N]o occasion to consider whether the Court of Appeals correctly resolved the issues of manageability and fluid class recovery, or indeed, whether those issues were properly before the Court of Appeals under the theory of retained jurisdiction. 417 U.S. at 172 n. 10.

Unlike the present case, Herbst involved a large class action brought by a small stockholder, who would not have proceeded absent class status. In these circumstances, the class action order raised questions of notice, manageability and potential expense to defendant which were unrelated to the merits of the action.

On the contrary, the rulings in this case are steps toward final disposition that will merge with judgment on the merits. Defendants would lose none of their rights by trial of the liability issues in this litigation. See Campbell v. Westmoreland Farm, Inc., 403 F.2d 939, 942 (2d Cir. 1968). Judge Blumenfeld's rulings may be reviewed upon appeal from final judgment--if plaintiffs prevail. On the other hand, the issues may never be reached. If defendants are exonerated by the trier of fact, they will have incurred no more burden or expense than a trial of the antitrust cases on behalf of the named plaintiffs alone.

This Court has repeatedly stressed that Cohen v. Beneficial Loan Corp. should be strictly construed, so as not to impair the final judgment rule. E.g., Weight Watchers of Philadelphia, Inc. v. Weight Watchers International, Inc., 455 F.2d 770, 773 (2d Cir. 1972). The following observations in Pfizer, Inc. v. Lord, 449 F.2d 119, 121 (2d Cir. 1971), are appropriate here:

> This litigation has already consumed sizable judicial resources and can be expected to continue to do so. It is not particularly helpful to have the defendants seek interlocutory review of each decision of the district court with which they disagree.

The class action determinations and related procedural rulings by the District Court simply do not qualify for review as "collateral" orders, nor does this case present such "unprecedented" or "extraordinary" questions as to warrant creating an exception to Section 1291's requirement of finality.

B. The Order Separating Liability and Damage Issues is Not Appealable

Based upon a thorough review of the evidence that will be presented to the jury, the District Court determined that the liability issues should be separated for trial prior to the calculation of damages, if necessary. This ruling is a discretionary matter that should not be reviewed on interlocutory appeal. "To extend the Cohen rule to this area would invite frustration and delay." 9 Moore, Federal Practice, ¶110.13[8] (1973 ed.). As Professor Wright has stressed:

> An order granting or denying separate trial is not appealable as a final judgment. The courts have rebuffed attempts to obtain review under the "collateral order" doctrine or by mandamus. The order can be certified for appeal under the interlocutory appeal statute but it is so clearly undesirable to have interlocutory review of these discretionary orders about the marshalling of the trial that interlocutory appeals should be permitted rarely, if at all." 9 Wright & Miller, Federal Practice & Procedure, §2392 (1971 ed.).

Counsel's research has failed to uncover any decisions that permitted interlocutory review under Section 1291 of an order separating issues for trial.

C. The Order Consolidating the Pending Cases for Trial is Not Appealable

The law is well settled that an order granting or denying a motion to consolidate is not appealable under Section 1291. E.g., Levine v. American Export Industries, Inc., 473 F.2d 1008 (2d Cir. 1973). Such orders do not have any "irreparable effect" upon the rights

of the parties to warrant immediate appeal. United States v. Chelsea Towers, Inc., 404 F.2d 329, 330 (3d Cir. 1968). "If the party is actually prejudiced by consolidation, relief can be had on appeal from a final judgment in the case." 9 Wright & Miller, Federal Practice and Procedure, §2386, p. 276 (1971 ed.).

Defendants cite MacAlister v. Guterara, 263 F.2d 65 (2d Cir. 1958), and Garber v. Randell, 477 F.2d 711 (2d Cir. 1973), which allowed appeals from rulings on motions to consolidate. Both of these decisions, however, turned on highly unusual circumstances not found in this case.*/ Most significantly, as pointed out in Papilsky v. Berndt, "the rights of the losing parties [in MacAlister and Garber] would have been mooted or destroyed if they had been forced to comply with the district court's decisions." 503 F.2d at 556. In this case, by contrast, defendants' rights may be fully protected on appeal from a liability determination against them.

---

*/ MacAlister arose before Section 1292(b) was available and involved the then-novel legal question of whether the trial court has power to consolidate for pretrial purposes. 263 F.2d at 67.

Garber was an appeal by the law firm of White & Case ("W&C") from an order that plaintiffs file a consolidated complaint against 58 defendants for violations of the federal securities laws, where W&C was being sued by only one of the 15 plaintiffs, some of the plaintiffs disassociated themselves from the claims against W&C, and "W&C [was] not claimed to have participated with these numerous other defendants in the extensive manipulative scheme allegedly carried out by them to defraud NSM stockholders, which formed the original basis and principal claim of all three actions." Consolidation of proceedings was affirmed, though. 477 F.2d at 716.

II. JUDGE BLUMENFELD'S CERTIFICATION OF STATE-WIDE AND NATIONAL CLASSES ACCORDS WITH SUBSTANTIAL PRECEDENT

The certification of classes under Rule 23(b) rests on the sound discretion of the trial court; defendants have advanced no legal grounds to disturb the continued maintenance of the state-wide and national class actions.

An unbroken line of federal decisions establish beyond question that state-wide classes of public entities satisfy the requirements of Rule 23.*/ For example:

> State of Illinois v. Brunswick Corp., 32 F.R.D. 453 (N.D. Ill. 1963)
>
> State of Illinois v. Bristol-Myers, Inc., 470 F.2d 1276 (D.C. Cir. 1972), aff'g, 55 F.R.D. 269 (D.D.C. 1972) (Ampicillin)
>
> State of Minnesota v. United States Steel Corp., 44 F.R.D. 559 (D. Minn. 1968)
>
> State of Iowa v. Union Asphalt & Roadoils, Inc., 281 F.Supp. 391 (S.D. Iowa 1968)
>
> State of New Jersey v. American Oil Co., 53 F.R.D. 45 (D.N.J. 1971)
>
> State of Connecticut v. General Motors Corp., M.D.L. Docket No. 65 (N.D. Ill., Order of January 24, 1973) (Automobile Fleet Discount)

---

*/ It appears that defendants concede the propriety of these class actions. (D. Br. 7).

Moreover, recent federal decisions fully support the certification of the national classes for public builders (not included in state-wide classes) and private builders.

> Gypsum Wallboard Antitrust Litigation, No. 46414-A (N.D. Cal., Pretrial Orders No. 32 and No. 34, July 14, 1972 and November 28, 1972)
>
> State of Illinois v. Harper & Row Publishers, Inc., 301 F.Supp. 484 (N.D. Ill. 1969)(Children's Books)
>
> Cast Iron Pipe Antitrust Cases, C.A. No. 71-516 (N.D. Ala., August 24, 1971)
>
> State of West Virginia v. Chas. Pfizer & Co., 314 F. Supp. 710 S.D.N.Y. 1970), aff'd, 440 F.2d 1079 (2d Cir. 1971), cert. denied,, 404 U.S. 871 (1972)
>
> State of Connecticut v. General Motors Corp., M.D.L. Docket No. 65 (N.D. Ill.)(Automobile Fleet Discount) (national class of commercial purchasers)

Now that these cases are being readied for trial after four years of discovery, defendants argue that the classes should be decertified because individual questions would make the litigation too complicated to manage. This is no ground for appeal.

III. THE LAW IS WELL-SETTLED THAT SEPARATE TRIALS MAY BE ORDERED WITH RESPECT TO LIABILITY AND DAMAGE ISSUES IN ANTITRUST CLASS ACTIONS

Judge Blumenfeld held that separation of liability issues for trial pursuant to Rule 42(b) offered the most fair and efficient way to resolve this litigation.*/ Recent decisions fully support this discretionary ruling. Significantly, these precedents are completely ignored by defendants.

A. The Procedure Adopted by Judge Blumenfeld has been Used in Numerous Antitrust Class Actions

The separation of liability and damage issues is a common tool for dealing with antitrust class actions. E.g., Aamco Automatic Transmissions, Inc. v. Tayloe, 1975 Trade Cas. ¶60,300 at p. 66,189 (E.D. Pa. 1975); Barr v. WUI/TAS, Inc., 66 F.R.D. 109, 115 (S.D.N.Y. 1975)("Proof of individual damages may, if necessary, be severed and treated in later proceedings"); Wainwright v. Kraftco Corp., 54 F.R.D. 532, 534-535 (N.D. Ga. 1972); City of Philadelphia v. American Oil Co., 53 F.R.D. 45, 67-68 (D.N.J. 1971); Sommers v. Abraham Lincoln Federal Savings & Loan Ass'n, 66 F.R.D. 581, 591-592 (E.D. Pa. 1975); and Gardner v. Awards Marketing Corp., 55 F.R.D. 460, 463 (D. Utah 1972). Indeed, in the Western Liquid

---

*/ The practical advantages of separating liability and damages have long been stressed by federal courts. E.g., Switzer Brothers, Inc. v. Locklin, 297 F.2d 39, 49 (7th Cir. 1961); LoCicero v. Humble Oil & Refining Co., 52 F.R.D. 28, 30-31 (E.D. La. 1971).

Asphalt Cases, 487 F.2d 191, 200 (9th Cir. 1973), cert. denied, 415 U.S. 919 (1974), the Ninth Circuit held that to "effectuate the policy of private antitrust enforcement, the cause should proceed on the liability issues."

This approach accords with the procedure approved by Judge Murrah in Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561, 567 (10th Cir. 1961), cert. dismissed, 371 U.S. 801 (1962), where the "factual question of the existence of the conspiracy and its total impact on the class was submitted to the jury, leaving to the court the function of assessing the amount of damages...."

In circumstances analogous to this case, Judge Carter held that "prompt determination of the underlying issue of liability within the context of this [class action] litigation seems the fairer and more efficient way of proceeding." City of New York v. General Motors Corp., 60 F.R.D. 393, 395 (S.D. N.Y. 1973). Judge Carter reasoned:

> The complaint alleges an unlawful, nationwide monopoly which operates to the detriment of every public body providing or financing bus systems in the United States. Should plaintiff succeed in providing that common claim, the complications which might arise by virtue of differences in the nature and extent of damages can be minimized by the establishment of separate proceedings to determine damages or by the determination of formulae for the assessment of damages sustained by various members of the class. Should plaintiff fail to prove its underlying claims, defendant would be spared relitigation of those issues by similarly situated potential plaintiffs.

A variation of the procedure adopted by the district court was followed in Gypsum Wallboard Antitrust Cases, a consolidated antitrust

proceeding which included complaints by national classes of purchasers on every level in the chain of distribution. Judge Zirpoli conducted an initial trial of liability issues on behalf of certain dealers, and thereafter conducted another trial to assess damages for the plaintiffs. Wall Products Co. v. National Gypsum Co., 326 F. Supp. 295, 296 (N.D. Cal. 1971), and 357 F.Supp. 832 (N.D. Cal. 1973).

B. The Liability of Defendants can Properly be Established on a Consolidated Basis with Respect to Purchasers of Price-Fixed Products

Defendants argue that liability and damage issues should not be separated for trial because the sale of contract hardware involves many details which necessarily make each transaction unique and, therefore, each class member must provide extensive information about the nature of its purchase to show that it was injured by the conspiracy. Defendants claim that the antitrust laws require plaintiffs to prove liability on a transaction-by-transaction basis. Their position boils down to the assertion that the facts regarding the marketing of contract hardware, apart from the conspiracy and its operation, are so complicated that these cases cannot be consolidated for trial and the issues of liability and damages cannot be separated without confusion; consequently, it would not be possible to manage the pending class actions. (D. Br. 20-34).

There are two crucial fallacies in this argument:

(i) It confuses the issue of impact as an element of liability with the question of amount of damages, which will vary for each class member.

(ii) It is bottomed on a portrayal of the contract hardware sales practices that does not square with the evidence showing the antitrust violations by defendants.

Plaintiffs intend to show agreements and concerted action among defendants to raise and maintain prices of contract hardware and to eliminate price competition on master key jobs, and that this illegal conduct had the effect of raising prices for contract hardware above freely competitive levels. Such proof is sufficient to establish liability of defendants to all class members who purchased contract hardware for master keyed projects at the inflated prices. Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390, 396 (1906); Ohio Valley Electric Corp. v. General Electric Co., 244 F.Supp. 914, 933 (S.D.N.Y. 1965).

1. A Liability Determination does not Depend upon a Lockset-by-Lockset Analysis of Every Contract Hardware Sale made under Defendants' Conspiracy to Fix Prices and Eliminate Competition Among Dealers

The defendants in almost every recent antitrust case have argued that class actions should not be certified because complex issues of "injury" to individual class members predominate over common issues, making the case unmanageable; and that liability cannot be tried separately because damages are a prerequisite to recovery under Section 4 of the Clayton Act. Judge Blumenfeld quite properly characterized "this classic defense argument" as a "red herring." 1975 Trade Cas. ¶60,377 at p. 66,638. The argument has been consistently rejected

by the federal courts in cases brought by purchasers alleging a conspiracy to fix prices or eliminate competition.

The issues of liability and damages were separated, over objection of defendants, and classes certified in the Ampicillin Antitrust Litigation. Judge Sirica reasoned:

> [T]here are aspects of proof regarding the existence, scope and effect of the alleged violations which are common to each plaintiff in these proceedings. However, defendant Bristol-Myers Company contends that "[n]o action herein is maintainable as a class action because the liability element of injury to business or property differs from plaintiff to plaintiff and therefore any common questions of law and fact do not 'predominate' as required by Rule 23(b)(3)." Each plaintiff must show, according to Bristol, how the alleged monopolization and exclusion of manufacturing competition affected the prices which that plaintiff paid and which he claims would have been lower had the competition not been excluded. Therefore, it is argued, if the alleged violations are proven, the defendants may be liable to one plaintiff but not to another depending on whether or not defendants' conduct caused him injury, and these circumstances preclude a finding that common questions of law and fact predominate.
>
> The Court believes that Bristol's argument would be more properly considered during treatment of the merits of the case regarding the calculation of the amounts of damages, if any. At this preliminary juncture, it appears that the common questions of liability and the fact of damage, i.e., whether the alleged combination and conspiracy actually had the effect of generally increasing price levels throughout the market in ampicillin, are still predominant over any questions affecting only individual members of classes. Therefore, the Court concludes with the weight of authority that these common questions are appropriate for classwide resolution. In Re Ampicillin Antitrust Litigation, 55 F.R.D. 269, 275-276 (D.D.C. 1972), aff'd sub nom., State of Illinois v. Bristol-Myers Co., 470 F.2d 1276 (D.C. Cir. 1972).

The same issues were given extended consideration by Judge McGarr in the Automobile Fleet Discount Cases, M.D.L. Docket No. 65

(N.D. Ill., Memorandum Opinion filed December 10, 1974). In support of his order that the liability issues be tried first, Judge McGarr reasoned:

> It seems to me that if the plaintiffs can prove, at a trial on liability, that the defendants conspired to maintain an agreed price structure, and did business at that conspiratorially arrived at price level, there has been impact.... So you don't have to know the extent of the individual damage claim ... in order to litigate the impact issue. (Proceedings of February 20, 1974, Tr. 52-53).

Thereafter, Judge McGarr rejected the claim of defendants that discovery into the conspiracy's "impact" upon each class member was necessary to prepare for a liability trial, noting that the

> impact of the conspiracy may be demonstrated on some one or few of the plaintiffs.... You don't have to explore the entire question of the conspiracy, if one exists, on every plaintiff in the case, in order to demonstrate that liability exists....
>
> The plaintiffs are saying that there was a conspiracy to eliminate a discount with the result of raising prices. Now, if they prove that they have gone one step down the road they have to go. Then they have to prove ... it was effectuated, it resulted in a change in the price structure to the customers. And if they prove that ... they have proved liability and we have then moved on to the question of damages. (Proceedings of September 19, 1974, Tr. 9-10, 17-18).

With respect to "ascertainment of liability" in the initial trial, Judge McGarr concluded:

> [T]he distinction I have tried to make is ... that there can't be a conspiracy and restraint of trade to fix prices and fix discounts, such as is alleged here, without proving that it was more than an academic exercise and that something happened pursuant to it which hurt somebody. That is almost prima facie really in my mind. When you establish a conspiracy to fix prices or to agree on discounts, the fact that somebody was

> damaged by it requires very little proof, because it is almost of the essence of such a conspiracy--if one ever existed--that it was for the benefit of the conspirators and to the detriment of the persons who were intended to be affected by it....
>
> It is not necessary that every plaintiff in the case be able to demonstrate some damage; all that is necessary to ascertain--if the plaintiffs are proceeding on the liability issue only--is that defendants conspired, as alleged, with resultant damage to somebody. Now if that is established--and therefore liability is established--it becomes an absolute defense, as far as the defendants are concerned, as to an individual plaintiff that that plaintiff suffered no damage at all and, therefore, is entitled to no damages....
>
> We certainly don't know the names of everybody in that class who will make claims for damages, in the event that damages are ever awarded. And I think, therefore, that you cannot take as a postulate--even in a jury trial--that you have to show injury to every member of a class--a defined group of ascertainable individuals--in order to predicate some finding of liability. ... Therefore, I think you can find injury to the defined class as a basis of liability, without necessarily finding injury to every individual member of the class. (Proceedings of January 14, 1975, Tr. 11-12, 13, 17).

The Supreme Court's holding in Burke v. Ford, 389 U.S. 320, 321-322 (1967), supports Judge McGarr's logic:

> Horizontal territorial divisions almost invariably reduce competition among the participants. [citations omitted] When competition is reduced, prices increase....

These observations have even greater force with respect to conspiracies to fix prices and allocate customers, such as alleged in this case. As stressed in Professional Adjusting Systems v. General Adjustment Bureau, Inc., 1974-2 Trade Cas. ¶75,183 at p. 97,332 (S.D.N.Y. 1974): "The proof of the conspiracy and its general objective defines its victims."

A generalized showing of impact--and damages--was found sufficient in Bray v. Safeway Stores, Inc., 1975-1 Trade Cas. ¶60,193 (N.D. Cal. 1975). Judge Carter reasoned:

> The result of the conspirators' influence in the meat industry was a market wide depression of wholesale beef prices.... [T]he lack of proof that A & P did not buy any of the plaintiffs' cattle is essentially irrelevant; there was sufficient evidence that the plaintiffs sold cattle in a market at prices depressed due to the acts of the defendant. It was the defendant who created an environment into which the plaintiffs were forced to sell their wares. See Wall Products Co. v. National Gypsum Co., 357 F.Supp. 832, 840 (N.D. Cal. 1973). That this economic manipulation had a direct adverse effect on the plaintiffs--cattlemen attempting to sell in a depressed market--is obvious. (emphasis added) At p. 65,666.

With respect to conspiracies to restrict price competition, it has been repeatedly held that "the fact that an illegal price-fixing agreement existed over a period of time may itself be proof of damage." Phillips v. Crown Central Petroleum Corp. 1975 Trade Cas. ¶60,335 at pp. 66,385-66,386 (D. Md. 1975); Fox West Coast Theatres Corp. v. Paradise Theatre Building Corp., 264 F.2d 602, 608 (9th Cir. 1958).

The recent decision in Goldfarb v. Virginia State Bar, 44 L.Ed.2d 572, 583-584 (1975), strongly reinforces Judge Blumenfeld's conclusion that "impact" upon the class may be proven in a separate liability trial prior to calculation of damages.*/ The Supreme Court held that plaintiffs did not need to show individual effect of the

---

*/ The liability and damage issues were separate for trial in Goldfarb.

alleged antitrust violation upon class members to establish the required effect on interstate commerce for Sherman Act jurisdiction:

> The fact that there was no showing that home buyers were discouraged by the challenged activities does not mean that interstate commerce was not affected. Otherwise, the magnitude of the effect would control, and our cases have shown that, once an effect is shown, no specific magnitude need be proved. E.g., United States v. McKesson & Robbins, Inc., 351 U.S. 305, 310 (1956). Nor was it necessary for petitioners to prove that the fee schedule raised fees. Petitoners clearly proved that the fee schedule fixed fees and thus "deprive[d] purchasers or consumers of the advantages which they derive from free competition." Apex Hosiery Co. v. Leader, 310 U.S. 469, 500 (1940). See United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

Defendants purportedly wish to probe the details of every transaction for which a class member claims damages. These details, however, go to the amount of damages to be awarded following a liability determination. This distinction is recognized by the cases that defendants cite. (D. Br. 17). For instance, Vandervelde v. Put and Call Brokers and Dealers Ass'n, 344 F.Supp. 118, 145 (S.D.N.Y. 1972), holds:

> The impact of contributing causes--other than the effects of the antitrust violation--on the injury for which a treble damage plaintiff seeks compensation is properly a question of the amount of damages which may be recovered.

In this connection, defendants erroneously argue that plaintiffs must show that overcharges resulted "directly and solely from defendants' illegal acts." (D. Br. 41). The general standard for proof of damages is set forth in Zenith Radio Corp. v. Hazeltine Research, Inc.,

395 U.S. 100, 114, n.9 (1969):

> [An antitrust plaintiff's] burden of proving the fact of damage under §4 of the Clayton Act is satisfied by its proof of some damage flowing from the unlawful conspiracy; inquiry beyond this minimum point goes only to the amount and not the fact of damage. It is enough that the illegality is shown to be a material cause of the injury; a plaintiff need not exhaust all possible alternative sources of injury in fulfilling his burden of proving compensable injury under §4.

As stressed in United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 219 (1940):

> [T]here was abundant evidence that the combination had the purpose to raise prices.... That other factors also may have contributed to that rise and stability of the market is immaterial.

The defendants in State of Illinois v. Harper & Row Publishers, Inc. (Children's Books), 301 F.Supp. 484 (N.D. Ill. 1969), made the same contentions advanced in this case. It was argued, with supporting affidavits, that books were unique products sold in diverse ways to customers with dissimilar requirements,*/ making "impact" an unmanageable issue. Upon analysis of the alleged conspiracy and its effect on

---

*/ On the basis of their self-serving descriptions of the library book industry and their sales practices, defendants initially had persuaded Judge Kraft to deny class action status in School District of Philadelphia v. Harper & Row Publishers, Inc., 267 F.Supp. 1001, 1004 (E.D. Pa. 1967). Further discovery proved Judge Kraft wrong; the evidence showed that the publisher defendants had engaged in a national conspiracy to prevent price competition among dealers and enforced the agreement not to give discounts by refusals to sell, by threats to terminate, and by concerted action discussed at periodic meetings of sales executives.

class members, though, Judge Decker rejected the argument that the litigation would be too complicated to manage.

Judge Decker determined that the single most important issue was whether the illegal conduct really occurred, noting that "regardless of which plaintiff presents the evidence, the same facts will establish the defendants' liability." If a horizontal conspiracy to prevent price competition were proven, "the thousands of purchasers will be able to recover from whichever publisher-wholesaler combination handled the particular titles that were bought." 301 F.Supp. at 488. Judge Decker further held that whether library books are "unique" products was a question common to the class:

> The publishers have used the label "uniqueness" to advance two defenses, both of which apply equally to all plaintiffs.
>
> First, since individual books differ, each is unique. But, the prices for rare art works could be pegged above the competitive level.
>
> Second, if two publishers produce competing editions of a single publication such as "Huckleberry Finn," variations in the binding, illustrations, and editing may result in distinct products that sell at varying price....
>
> If the demand, content, and prices of individual books is indeed divergent, perhaps the defendants did not conspire to fix prices. But, the resolution of the parties' factual disputes will be accomplished at trial, not now. 301 F.Supp. 488-489.

The separation of liability and damage issues does not prejudice defendants in any way. Any defenses based upon different selling or purchasing practices could be interposed in the initial trial as to

liability. If defendants can persuade the jury in this case that each sale of contract hardware involves unique factors and the details of these transactions are too complex to be affected by the antitrust violations, they may escape liability. But plaintiffs must be given the opportunity to prove that the illegal conspiracy to fix prices and eliminate competition on master key jobs operated to inflate contract hardware prices irrespective of the particular circumstances of each purchase. If plaintiffs prove the conspiracy and its effect, differences between purchasers go to the amount of damages.

The amount of damages suffered by class members will necessarily vary. In this respect, defendants can point to several instances where the conspiracy may have broken down and purchasers of contract hardware therefore not damaged. This is conceded; plaintiffs intend to use such incidents as a measure of the price difference that would have resulted from actual competition--or the amount of damage. But the fact that the conspiracy was not 100% effective does not absolve defendants from liability. It was per se illegal for the defendants to have an "understanding and accord among them, to avoid having the general price levels disrupted." Armco Steel Corp. v. Adams County, North Dakota, 376 F.2d 212, 214 (8th Cir. 1967).

The decision in San Antonio Telephone Co. v. American Telephone & Telegraph Co., 1975-2 Trade Cas. ¶60,421 (W.D. Tex. 1975), though relied upon by defendants (D. Br. 27), reaffirms the propriety of

the class action determinations in this case. Plaintiffs in San Anton ? Telephone charged that the monopolistic tendencies of defendants injured competitors "in their businesses through lost profits and generally in an inability to favorably compete." At p. 66,855. Judge Wood ruled in these circumstances that each plaintiff must show how its business suffered by reason of defendants' illegal conduct.

On the other hand, Judge Wood's opinion recognized that Rule 23 class actions would be appropriate in price-fixing and tie-in types of antitrust suits. The opinion first discussed Simpson v. Union Oil Co. of California, 377 U.S. 13 (1964), in which defendant had used consignment agreements to set prices at which retailers could sell gasoline. The Supreme Court held: "There is actionable wrong whenever the restaint of trade or monopolistic practice has an impact on the market...." 377 U.S. at 16. Judge Wood then noted that common issues of liability would predominate in a price-fixing case:

> In such a case, every consignee and potential consignee could be members of a class in a class action anti-trust suit for the reason that, by establishing the fact of price fixing, the plaintiff establishes the fact of injury in that his ability to charge prices different from what Union Oil would have him charge is completely denied him. Thereby, his ability to be competitive in his own area is endangered....
>
> Comparable in effect to the price fixing type of anti-trust suit discussed in the Union Oil Company Case, supra, is the "tie-in" type of anti-trust suit whereby a particular retailer or franchisee is sold one product only upon agreement that he purchase one or more other products. All purchasers or potential purchasers of the product in question and the tied product, therefore, have a question of law common such as would support a class action. Furthermore, the proof would be the

> same as to each member of the class. Once the fact of an illegal tie-in is established, there is established a violation of the Sherman Act and consequent damage to the individual and class plaintiffs.... While perhaps not a monetary damage, although monetary damage could be established, the fact of damage is established and an equitable relief such as an injunction prohibiting the defendant from enforcing the tie-in type of agreement would be in order and could apply to all members of the class equally upon the same limited proof. San Antonio Telephone, at pp. 66,854 66,855.*/

Defendants rely heavily on In re Transit Company Tire Antitrust Litigation, 67 F.R.D. 59 (W.D. Mo. 1975), a lower court decision that is out of step with substantial precedent. That case may be distinguished on its facts; plaintiffs there contended that defendants marketed commercial tires in a restrictive manner through the use of a "lease-only" policy and that the leases were unfair in a number of respects. Unlike this case, Judge Hunter ruled that class actions in Transit Tires would be unmanageable before substantive discovery into the antitrust violations.

---

*/ Defendants cite Plikowski v. Ralston Purina Co., 1975-2 Trade Cas. ¶60,411 (M.D. Ga. 1975), which refused to certify a class action charging that defendant "tied" credit to the exclusive purchase of its feed. The lower court thought that credit was not a distinct product, being ancillary to some sales, and that releases by class members posed individual issues that would make the case too difficult to manage. The facts in Plikowski are a far cry from the evidence as to the nature and effect of the antitrust violations in this case. It would be erroneous to draw any general conclusions from Plikowski with reference to tying cases. Ungar v. Dunkin' Donuts of America, Inc., 1975-1 Trade Cas. ¶60,204 (E.D. Pa. 1975); Sommers, supra, 66 F.R.D. at 591.

His ruling was thus based on a prediction that trial "would more than likely involve significantly different evidence and factual determinations" for each class member's lease arrangement. 67 F.R.D. at 73. Such inquiry would not be required with respect to the nature of the antitrust violations in this case, where the evidence shows that defendants illegally agreed to fix prices and eliminate competition on master keyed jobs. See Kinzler v. New York Stock Exchange, 62 F.R.D. 196, 200-201 (S.D.N.Y. 1974).

Furthermore, Judge Hunter found that "proof of damages in this litigation will be of an individual nature" and that such a possible task made the class action unmanageable. 67 F.R.D. at 74-75. From the premise that each class member would have to appear ir court and establish the amount of its monetary damages,*/ Judge Hunter concluded "that the class action device offers no superiority over the individual litigation of claims." 67 F.R.D. at 75. This conclusion not only ignores the procedures that may be used at the damage stage, such as reference to a special master, but pretrial procedures to secure evidence in lieu of appearances at trial.

---

*/ This issue has not yet been reached even at the trial level here, but it is well-established that defendants are not "entitled to compel a parade of individual plaintiffs to establish damages," much less liability. In Re Antibiotic Antitrust Actions, 333 F. Supp. 278, 289 (S.D.N.Y. 1971).

2. The Illegal Conduct by Defendants Operated to Raise Prices Regardless of the Type or Location of Class Members

The trial court's rulings must be considered in the context of the alleged conspiracy to eliminate competition and its effect upon prices, not upon defendants' industry model, which assumes a freely competitive market. The evidence refutes the factual premises for defendants' argument that proof of liability must proceed on a transaction-by-transaction basis.

The Designation of Evidence (Jt. App. (II), pp. 339A-523A) and interrogatory answers filed by plaintiffs with respect to the conspiracy shows that the sales executives of the four defendants exchanged price information and met regularly to stabilize price levels throughout the country. For instance, L. Curtis Booth, vice president of Emhart, testified that defendants took concerted action at these meetings to police and prevent price-cutting below list prices.*/ In this regard, Eli Yale, sales manager of Sargent, advised his regional sales managers not to give price concessions, stating that "it is imperative that we keep the

---

*/

Q Did you discuss general price levels for hardware, finished hardware?

A Not as such. We always would receive at our plants reports of prices on specific buildings coming in from all over the country to us. And as we would chart those it could develop a pattern showing that in one section of the country or another somebody was perhaps not quoting up to their full published prices.

Q Did you have occasion to exchange pricing information with any of these representatives of other hardware manufacturers?

(Continued on next page)

price structure under as rigid control as possible" and "it is of the utmost importance not to upset any pattern of operation which can be interpreted by our competitors." (Gray Dep. Exh. 12, Jan. 1962).

Moreover, defendants' agreement to eliminate competition among their dealers operated to raise the prices charged for contract hardware. Defendants' own memoranda leave no doubt of their aims, and the fact that their illegal agreements were enforced throughout the country. As acknowledged in a memorandum circulated among Sargent's sales executives, industry-wide adherence to the policy against competition was pursued to maintain inflated prices:

> In this regard we cannot tolerate a Sargent distributor bidding on a job specifically laid down to another manufacturer's existing masterkey, any more than we can tolerate another manufacturer's distributor bidding an existing Sargent masterkey. Such unethical bidding not only results in a depressed selling market, but produces a retaliatory market having a far reaching effect. (Gray Dep. Exh. 51, January 1964).

---

*/ (Continued from previous page)

A Well, to the extent that I have mentioned before as a developing pattern showing that one or the other might be cutting prices in an area. We tried to take them to task for it to get it straightened out.

* * *

A [E]ach of our competitors had our price book and we had theirs.

Q And whenever there was a change in the prices in your price book you would inform your competitor?

A Yes, the changes would go to them. (Booth Tr. 18).

Russwin insisted that its distributors not interfere with existing master key jobs:

> This not only makes good business sense but it is one of the main points of ethics of our industry and the A.S.A.H.C. For if the continuation of master key systems isn't respected by all, this would break down the economics and frankly, the making of reasonable profits for our industry..... (emphasis added) (Maher Dep. Exh. 6, March 1963).

This policy against competition is boldly set forth in Emhart's sales manuals with respect to "Breaking Master Key Systems":

> Over the long pull the deliberate breaking of any manufacturer's key system by any dealer is not a sound policy. Every manufacturer and every dealer has the same privilege and if every one pursued this policy, master key systems as such would have no value to the dealer or to us as manufacturers. (Bauman Dep. Exhs. 79-A and B, August 1963).

The defendants' sales restrictions and the ASAHC's "code of ethics" manifested the industry-wide understanding that price competition "can become most unpleasant for all of us and no one will make any money." (Emphasis added) (Bauman Dep. Exh. 19, April 1963). Taking a Russwin dealer to task for bootlegging Corbin hardware, Edward H. McCulloch, vice president--sales, explained the "ethics in our industry and ... the ethics of the American Society of Architectural Hardware Consultants:" a dealer is "entitled" to master key jobs "without having outside competition." The sale of hardware to infringe on jobs of another manufacturer "can be a two edged sword and can be turned on you in the same manner by your Corbin competitor or let's broaden it even further, Yale, Lockwood and Sargent...." (Bauman Dep. Exh. 18, March 1963).

Moreover, the evidence demonstrates that the conspiracy did cause higher prices for contract hardware than would have prevailed in a freely competitive market. As set forth in the Designation of Evidence (pp. 78-84), the conspiracy inflated prices of contract hardware in several ways:

(i) Defendants met and exchanged price information to stabilize their list or book prices at artificially high levels;

(ii) On master key extensions, defendants gave no price concessions, which otherwise ranged from 10 to 20%;

(iii) Because of the restraints on competition, dealers charged substantially higher prices on master key extensions and other protected jobs.

Owner's Preference

Defendants argue that an owner's decision to continue a master key system limits competition among hardware suppliers and makes the owner "responsible for the alleged overcharge." (D. Br. 23-24).*/ On the contrary, the evidence shows that defendants illegally agreed to eliminate competition on master key systems regardless of the owner's choice.

---

*/ If this disingenuous argument were true, there would have been no reason for the restraints upon competition enforced by defendants and the industry's trade association. The law is clear, in any event, that plaintiffs were entitled to a competitive price from whatever hardware supplier they chose; there is no duty to mitigate damages. As the Supreme Court held in Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 489 (1968): "If in the face of the overcharge the buyer does nothing and absorbs the loss, he is entitled to treble damages."

The whole purpose of the conspiracy was to prevent price competition by dealers which might cause an owner to change brands of hardware or supplier. In this respect, Edward H. McCulloch stressed in 1965 to a joint meeting of industry trade associations, the ASAHC and BHMA, that the industry-wide prohibition against "breaking" a master key system was designed to protect the originating dealer (and his manufacturer) from price competition. As he explained: "The system is 'broken' when a low bid from a competitor forces the owner through economic pressure to establish a new system." (AS 1189, October 1965). To translate, "economic pressure" simply means a competitive price. Moreover, defendants prohibited their dealers from offering to extend master key systems by supplying the contract hardware of another manufacturer, rather than their own. For example, McCulloch advised a Russwin salesman in 1963 that it would be necessary to terminate a dealer for "unethical tactics and practically breaking a key system" because the dealer purchased Corbin hardware from someone other than the dealer to whom the master key "belonged." McCulloch was emphatic:

> You know our policy on this. Even though they actually haven't broken a P & F Corbin system they bid into some and this is against our policy. (McCulloch Dep. Exh. 32, October 1963).

The Nature of the Specifications

Defendants argue that different procurement practices of governmental entities "pose unique questions as to the existence of any restrictive practices under such conditions and the impact of any such

practices which may have existed." (D. Br. 35). A closer look at their examples belies this argument.*/ The State of Mississippi, in fact, sought to obtain competition on master key work by not permitting specifications on public construction projects to read "keyed to existing system." But defendants still insisted that "dealers protect each others masterkeys." Writing to Carl Bauman, sales manager of Corbin, McCulloch stressed:

> It would seem to me that even though it isn't in a spec, and if people know it is a bonafide key system, they should honor each other. (McCulloch Dep. Ex. 35, April 1962).

---

*/ This argument is irrelevant not only to liability, but perhaps damages as well. In Ohio Valley Electric Corp. v. General Electric Co., 244 F.Supp. 914 (S.D.N.Y. 1965), defendants contended that the buyer for a major plaintiff was an excellent negotiator who obtained large discounts on the generators and spare parts. To this contention, Judge Feinberg replied:

> The real question is whether the negotiator ... could press beyond certain limits. This, of course, raises the key issues of (1) was there a conspiracy to fix prices and (2) did this conspiracy affect the prices ... and, if so, to what extent?

Having concluded that there was a conspiracy and prices during the conspiracy were significantly higher than during a comparable period after the conspiracy, Judge Feinberg awarded substantial damages estimated on the basis of the adjusted difference between a free market price and the conspiratorial price. He did not reduce damages one cent due to negotiated discounts that plaintiff had obtained from General Electric and Westinghouse. 244 F.Supp. at 946-949.

> I'd rather lose the job to Y & T [Yale & Towne] than to be instigator of breaking key system." (McCulloch Dep. Exh. 34, March 1962).

Moreover, defendants arranged for collusive bids to create the appearance of competition, regardless of purchasing practices. (Designation of Evidence, pp. 70-78). These collusive bids were submitted as a "means of having the owner and architect believe they were getting competitive bids from two sources." (McCulloch Dep. Exh. 38, March 1962).

Regional Markets

Defendants argue that "local variations in market conditions" affect the impact of their antitrust violations. (D. Br. 35). This contention ignores the evidence that the restrictions on competition were implemented by the defendants as a matter of general policy and were enforced by concerted action and other measures on dealers throughout the country. It is another matter that must be resolved by the trier of fact.

For example, Emhart's sales manuals during the conspiratorial period stressed the industry-wide prohibition against breaking master key systems. In 1957, W. J. Ziegenhein, vice president of Emhart, wrote to all salesmen asking them to make certain "that our dealers refrain from quoting" jobs with another manufacturer's master key system:

> You are all thoroughly familiar with our policy as it relates to efforts made to break any manufacturer's master key system. This is extremely bad practice not only from the moral standpoint but it can work in reverse as well and give the competitor reason to break our system. (Lichtenfels Dep. Exh. 30).

The sales manuals were distributed to all sales personnel and provided that "each supervisor will be held accountable for adherence to and strict enforcement of standard practice" with respect to "breaking masterkey systems."*/ (Lichtenfels Dep. Exh. 32, 1965).

The supposed regional differences in sales practices of distributors made absolutely no difference to the operation of the conspiracy. Defendants implemented and reinforced their horizontal conspiracy to protect master keyed jobs from competition by allocation of master key systems, territories and customers among their own dealers. Where owners sought to secure competitive prices for contract hardware by the solicitation of bids from contractors outside their area, defendants would arrange for dealers in the other regions to submit collusive bids to the other general contractors.

---

*/ Russwin further warned:

> It is now emphatically stated that it is your responsibility to stop such practices yourself, as well as to stop any dealer who is now or in the future making efforts to break the other dealer's master key system....
>
> It is your responsibility to thoroughly discuss this policy matter with every one of your dealers and be sure they completely understand this policy will be enforced. (Lichtenfels Dep. Exh. 31, August 1959).

Damages May be Small

Defendants seek to paint this litigation as involving only de minimis overcharges by their estimate that contract hardware amounts to less than 10% of total construction cost (D. Br. 14), the implication being that the potential recovery does not justify litigation of these actions on behalf of class members. While contract hadware may be a relatively small part of total construction cost, the documents obtained during pretrial discovery show that defendants sold more than $370,000,000 of contract hardware during just the years 1965 to 1970, and the alleged conspiracy began at least as early as 1950.

In addition, plaintiffs were damaged by overcharges on contract hardware of other manufacturers that was sold for master keyed projects. The interrogatory answers filed by plaintiffs document numerous construction projects where the cost of contract hardware ranged from $40,000 to more than $150,000.*/ This case is hardly one where potential recovery for individual class members might be less than costs of administration.**/

---

*/ Interrogatory answers filed by the States of Illinois and Michigan are included in the Joint Appendix, pp. 245A-363A and 613A-746A.

**/ Compare In re Hotel Telephone Charges, 500 F.2d 86, 88 (9th Cir. 1974)(average claim "about $2.00 per person.")

3. There is a Direct and Readily Provable Relationship Between Defendants' Price-Fixing Conspiracy and the Overcharges to Plaintiffs who Purchased Contract Hardware for Master Keyed Projects

Defendants reiterate the argument throughout their brief that plaintiffs must "establish causation or 'impact' as a prerequisite to monetary relief." (D. Br. 16, 15-17, 21, 27-28). For this purpose, plaintiffs intend to show the effects of the antitrust violations upon the prices of contract hardware purchased by plaintiffs and class members--as Judge Blumenfeld has required. 1975-1 Trade Cas. ¶60,377 at pp. 66,637-66,638. The cases cited by defendants in support of their argument, however, were concerned with whether plaintiffs such as competing manufacturers or distributors were within the "target area" of illegal restraints by defendants upon other parties.

For instance, Billy Baxter, Inc. v. Coca-Cola Co., 431 F.2d 183 (2d Cir. 1970), involved a claim that an agreement to allocate territories between Coca-Cola and Canada Dry somehow harmed companies that plaintiff franchised to make carbonated beverages. A majority of this Court held that the possible injury was so "incidental" that plaintiff lacked "standing" to sue under Section 4 of the Clayton Act. 431 F.2d at 187, 189. Likewise, plaintiffs in Al Barnett & Son, Inc. v. Outboard Marine Corp., 64 F.R.D. 43 (D. Del. 1974), were suppliers of products sold in competition with the marine accessories that defendant "tied to" its sale of outboard motors. The circumstances in those cases required inquiry as to whether the antitrust violations caused the

plaintiff to lose business, and profits.*/ This, in turn, depends upon whether plaintiff's operation "was actually in the area which it could reasonably be foreseen would be affected by the conspiracy," Twentieth Century Fox Film Corp. v. Goldwyn, 328 F.2d 190, 220 (9th Cir. 1964), cert. denied, 379 U.S. 880 (1964); Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358 (9th Cir. 1955).

There is no question that plaintiffs--as purchasers of contract hardware--are within the "target area" of the illegal agreement and acts by defendants to fix list prices and stabilize price levels of contract hardware by eliminating competition among dealers. E.g., Bray v. Safeway Stores, Inc., 1975-1 Trade Cas. ¶60,193 at p. 65,666 (N.D. Cal. 1975): "Mangano and Ultimate-Consumer Standing: the Misuse of the Hanover Doctrine," 72 Colum. L. Rev. 394, 413 (1972).

Defendants contend, in effect, that plaintiffs have no "standing" to recover damages since they did not purchase contract hardware directly from defendants. This argument was rejected by Judge Blumenfeld in a well-reasoned opinion more than two years ago, In Re Master Key Antitrust Litigation, 1973-2 Trade Cas. ¶74,680 (D. Conn. 1973), which has been followed in subsequent decisions. In re Western Liquid Asphalt Cases, 487 F.2d 191 (9th Cir. 1973), cert. denied, 415 U.S. 919 (1974); Carnivale Bag Co. v. Slide-Rite Mfg. Corp., 1975-1 Trade Cas. ¶60,370

---

*/ In Atlas Building Products Co. v. Diamond Block & Gravel Co., 269 F.2d 950, 956-958 (10th Cir. 1969), the jury properly found that a competing manufacturer had been damaged by defendant's price discrimination between purchasers in different geographic regions. On the other hand, the lower court in Bowen v. New York News, Inc., 1975-2 Trade Cas. ¶60,415 (2d Cir. 1975), concluded that plaintiffs, independent home newspaper delivery dealers, actually benefited from the exclusive dealing and territorial restraints defendant imposed on its own franchised dealers. At pp. 66,822-66,823.

(S.D.N.Y. 1975). See also Perkins v. Standard Oil Co., 395 U.S. 642 (1969). Moreover, this argument concerns proof of damages, not liability, and the evidence shows plaintiffs were the only persons injured by the overcharges that resulted from illegal price-fixing, job allocation and bid rigging. This will be established through industry witnesses and economists; affidavits filed by two leading experts in the antitrust field, Peter Max and Willard F. Mueller, illustrate the nature of the evidence to be presented. (Appendices A and B). The fact that plaintiffs purchase through contractors does not affect the damages sustained; if the cost of contract hardware were inflated by the conspiracy, that excess directly registers in the contractor's bid regardless of the other factors he considers in setting the bid.*/ Consequently, Judge Blumenfeld recognized that it may be possible "that the governmental plaintiffs could readily prove that they, and not the contractors,

---

*/ Prior to bidding the contractor knows what contract hardware is required and determines his costs by getting firm quotes from distributors. Based on the lowest quotation he receives, the contractor includes the full cost of the contract hardware in his bid as a known material cost. The contractor totals his material costs and adds a percentage for overhead and profit when he calculates his bid to the owner. If the distributor were to charge a lower price for the hardware, the contractor's bid to the owner would be reduced by the same amount (as well as the percentage mark-up applied to that amount). The general contractor is simply a conduit.

While the contractor's bid will depend on the contractor's estimate of factors such as labor costs, overhead, and competition, the basic fact remains that the contractor's bid directly includes the cost to him of the contract hardware without variation. Competition among contractors does not affect the price of contract hardware and therefore is irrelevant to the question whether public agencies were injured by the illegally inflated price of contract hardware.

have suffered the overcharges." 1973-2 Trade Cas. ¶74,680 at p. 94,981. The same conclusion was reached by the Eighth Circuit after trial in Armco Steel Corp. v. State of North Dakota, 376 F.2d 206, 210-211 (8th Cir. 1967). See also State of Missouri v. Stupp Brothers Bridge & Iron Co., 248 F.Supp. 169, 174 (W.D. Mo. 1965); State of Washington v. American Pipe & Construction Co., 274 F.Supp. 961, 962-963 (S.D. Cal. 1967).

C. This Circuit has Commended the Separation of Liability and Damage Issues for the Fair and Effective Administration of Class Actions

By recent decisions affirming class action certifications, this Court has recognized the flexibility afforded by Rule 23 with respect to procedures and the structure of classes. In Green v. Wolf Corp., 406 F.2d 291, 301 (2d Cir. 1968), cert. denied, 395 U.S. 977 (1969), defendant contended that each shareholder had to show reliance and injury, so that the common issues of misrepresentations did not predominate. Judge Kauffman held that, even were individual proof of reliance necessary, this argument must be rejected:

> Carried to its logical end, it would negate any attempted class action under Rule 10b-5, since as the District Courts have recognized, reliance is an issue lurking in every 10b-5 action.... We see no sound reason why the trial court, if it determines individual reliance is an essential element of the proof, cannnot order separate trials on that particular issue, as on the question of damages, if necessary. The effecti administration of 23(b)(3) will often require the use of t... "sensible device" of split trials. Frankel, [Some Preliminary Observations Concerning Civil Rule 23], 43 F.R.D. at 47. 406 F.2d at 301.

Later in Herbst v. ITT Corp., 495 F.2d 1308, 1316 (2d Cir. 1974), Judge Lumbard held that trial court did not abuse his discretion in authorizing the maintenance of a class action, where it had reasoned:

> Requiring proof of individual reliance was no bar to a class action since the common issues could be tried as a class action and individual damages and reliance could be tried separately if necessary. 495 F.2d at 1314-1315.

The separation of liability and damage issues is the fairest procedure to determine whether the trial court should undertake the necessary complexities of damage proof for class members. As stressed in Grad v. Memorex Corp., 61 F.R.D. 88, 103 (N.D. Cal. 1973):

> While the court looks with concern upon the prospect of burdening a jury with the task of analyzing the damages to each class member even with the assistance of a master, it must be kept in mind that that task need not be assumed unless and until the issue of liability is resolved in favor of the plaintiffs.... And if liability is found, it is unquestionable that the court has the duty to see that wronged shareholders recover. To deny a class determination on the ground that the computation of damages might render the cause unmanageable would encourage corporations to commit grand acts of fraud instead of small ones with the thought of raising the spectre of unmanageability to defeat the class action. The court does not deceive itself in believing that this task will be easy; it does believe, however, that justice requires it be attempted.

D. There is No Basis to Disturb the Determination that These Class Actions Can be Managed

The question of manageability is entrusted to the discretion of the trial court. See, e.g., Appleton Electric Co. v. Advance-United Expressways, 494 F.2d 126, 139 (7th Cir. 1974). Defendants' speculation that liability and damage trials will involve lengthy proceedings does not warrant finding Judge Blumenfeld abused his discretion. In any event, the potential problems of administration imagined by defendants pale in comparison to the large nation-wide antitrust cases that have been successfully managed.*/ E.g., State of Illinois v. Harper & Row

---

*/ The litigated Tetracycline cases forcefully demonstrate that even consumer class actions are manageable. When consumer classes were certified in the Antibiotic Antitrust Actions, 333 F.Supp. 278 (S.D.N.Y. 1971), Judge Lord noted that:

> [D]ifficulties in management are of significance only if they make the class action a less "fair and efficient" method of adjudication than other available techniques. This perspective is particularly important in the present cases where the defendants, after reciting potential manageability problems, seem to conclude that no remedy is better than an imperfect one. The court would be hesitant to conclude that conspiring defendants may freely engage in predatory price practices to the detriment of millions of individual consumers and then claim the freedom to keep their ill-gotten gains.... 333 F.Supp. at 282-283.

At the conclusion of the proceedings involving state consumer class actions, Judge Lord stressed:

> With the use of computers and other disciplines, along with the assistance of very capable lawyers, this (consumer) class action has proven to be not only manageable but a great benefit to the consumers involved. The Court again states that this case has always been and continues to be manageable. In re Antibiotic Antitrust Actions, 4-71 Civ. 435 (D. Minn., opinion filed June 25, 1975).

Publishers, Inc. (Children's Books), 301 F.Supp. 484 (N.D. Ill. 1969) (more than 25 defendants); Gypsum Wallboard Antitrust Cases, No. 46414-A (N.D. Cal.)(classes certified for both indirect and direct purchasers against seven defendants). The Cast Iron Pipe Cases, CA 71-516 (N.D. Ala.), a national class action on behalf of public entities against nine defendants, was tried to a jury; following the jury's failure to reach a verdict, the cases were settled.

The damage question, if reached, may be resolved through a number of procedures, such as reference to a special master, which remain to be considered by the trial court. 1975 Trade Cas. ¶60,377 at p. 66,640. There is no basis at this stage to anticipate that insurmountable problems will be encountered.

The nature of the conspiracy established by plaintiffs at the liability trial would have a bearing upon the method used to determine the amount of damages. The establishment of a horizontal conspiracy would greatly simplify the calculation of total overcharges on contract hardware. A horizontal conspiracy, if proven, makes each defendant responsible for the sales of defendants and co-conspirator distributors, Twentieth Century Fox Film Corp. v. Goldwyn, 328 F.2d 190, 212 (9th Cir.), cert. denied, 379 U.S. 880 (1964), and all sales of contract hardware made under the umbrella of the system to eliminate competition on master keyed jobs. State of Washington v. American Pipe & Construction Co., 280 F.Supp. 802 (S.D. Cal. 1968).

The federal courts have firmly adhered to the principle that once liability has been shown, complexity or uncertainty as to the amount of damages will not preclude recovery. E.g., Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 264 (1946); Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 563 (1931); Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359, 379 (1927). With respect to proof of damages the Ninth Circuit has stressed in the Western Liquid Asphalt Cases, 487 F.2d 191, 200-201 (9th Cir. 1973), cert. denied, 415 U.S. 919 (1974), that:

> Direct proof of payment is not required, of course, because to require it could prevent enforcement of antitrust laws....
>
> Facts raising reasonable inferences, based upon appropriate market data, should suffice to go to the jury on these questions.

Against the experience in analogous class actions that were efficiently resolved, defendants rely on holdings in Kline v. Coldwell, Banker & Co., 508 F.2d 226 (9th Cir. 1974), cert. denied, 44 L.Ed. 449 (1975), and In Re Hotel Telephone Charges, 500 F.2d 86 (9th Cir. 1974), that rejected class actions as not proper due to the magnitude and complexity of the individual questions created by the vast number of defendants named in those cases. (D. Br. 18-20). The action in Hotel Telephone Charges was brought on behalf of forty million persons against 57 hotel chains and 600 individual hotels. Kline involved a class of defendants that numbered more than 2000. The Ninth Circuit emphasized that varying questions of law and fact had to be proven with respect to

each defendant, which negated the common question requirement of Rule 23. 508 F.2d at 89.*/ Such circumstances are a far cry from the facts presented in this litigation. This case simply does not raise the type of administrative problems that have disturbed federal courts in consumer class actions brought for many millions of persons with relatively tiny claims. E.g., Boshes v. General Motors Corp., 59 F.R.D. 489 (N.D. Ill. 1973).

E. There is Unquestioned Authority for Trial of Damage Issues Before a Separate Jury

Defendants argue they are entitled to the same jury for liability and damages, relying solely on expressions of the general principle that separate trials should not be ordered where the issues are so "interwoven" that confusion would result. E.g., Swofford v. B & W, Inc., 336 F.2d 406, 445 (5th Cir. 1964). These cases recognize, however, that liability and damages can be separated--and tried to different juries--depending on the circumstances. Gasoline Products Co. v. Champlin Refining Co., 283 U.S. 494, 499 (1931); United Air Lines, Inc. v. Wiener, 286 F.2d 302, 306 (9th Cir. 1961).

---

*/ Because of the joint and several liability facing the many small defendants in Kline, the Ninth Circuit felt that the enormity of the possible recovery "would shock the conscience." 508 F.2d at 234.

Defendants completely ignore the well-established authority that damages can be separated for trial before the same or different juries. In re New Hampshire Air Crash Disaster, 342 F.Supp. 907 (D.N.H. 1971); O'Donnell v. Watson Bros. Transportation Co., 183 F.Supp. 577, 585-586 (N.D. Ill. 1960); Hosie v. Chicago & N.W.Ry. Co., 282 F.2d 639 (7th Cir. 1960); Eastern Fireproofing Co. v. United States Gypsum Co., 50 F.R.D. 140 (D. Mass. 1970). The retrial of damages before a separate jury has occurred in recent antitrust cases. E.g., Terrell v. Household Good Carriers' Bureau, 494 F.2d 16 (5th Cir.), cert. dismissed, 419 U.S. 987 (1974); Lehrman v. Gulf Oil Corp., 500 F.2d 659 (5th Cir. 1974).*/

---

*/ As stressed by Professor Wright:

> An argument that two juries may be used if one jury has first decided all the issues--though its verdict as to one of them has passed out of the case--but that two juries may not be used in the first instance seems untenable. The great guarantee of the Seventh Amendment will hardly support such a gossamer distinction. 9 Wright and Miller, Federal Practice and Procedure, §2391 (1971 ed.).

IV. CONSOLIDATION OF THE PENDING CASES FOR TRIAL WAS AN APPROPRIATE EXERCISE OF DISCRETION

Defendants originally moved for transfer of individual cases pending in other jurisdictions to the District of Connecticut pursuant to 28 U.S.C. §1404(a) and §1407. Now that trial is near, defendants reverse their position and oppose consolidation of the cases for trial. (D. Br. 42). Their argument is frivolous, at best.

There is clear authority for consolidation of all cases under Section 1404(a). In Re Antibiotic Antitrust Cases, 333 F.Supp. 299, 303 (S.D.N.Y. 1971); Illinois v. Harper & Row Publishers, Inc., 67 C 1899 (N.D. Ill.)(Memorandum Opinions of March 23 and August 20, 1971); Cast Iron Pipe Antitrust Cases, CA 71-516 (N.D. Ala.)(Pretrial Order No. 9, November 29, 1972).

There is nothing exceptional about the consolidation order. The complaints name the same defendant manufacturers and allege the same illegal conduct. All plaintiffs must rely upon the same evidence to establish the unlawful acts and their effect upon price levels. Professional Adjusting Systems v. General Adjustment Bureau, Inc.. 1974-2 Trade Cas. ¶75,183 at p. 97,333 (S.D.N.Y. 1974). Plaintiffs have alleged illegal agreements and concerted action among defendants and distributors to raise prices and eliminate competition on master key jobs. Defendants implemented this conspiracy by prohibiting their distributors from selling contract hardware outside their assigned territories or for existing master key systems of another manufacturer.

Defendants jointly enforced these prohibitions. Accordingly, the nature of the arrangements with dealers and coercion of dealers must be shown in connection with proof of the overriding conspiracy among defendants, regardless of how many cases are tried together.*/

In similar circumstances presented by the Children's Books Antitrust Litigation, Judge Decker ruled that individual damage issues would not interfere with consolidated trial of the issue whether defendants were liable to the class for their violations of the antitrust laws, even though the complaints named different defendants. State of Illinois v. Harper & Row Publishers, Inc. (Memorandum Opinion filed March 23, 1971).**/

---

*/ If defendants are not found to have violated the antitrust laws, all plaintiffs would be bound by that determination and this litigation would end.

**/ Judge Decker's reasons for consolidation apply with equal force to the facts of this case:

> A common question of law in the nine cases is defendants' liability for allegedly conspiring to fix net prices on the sale of library editions of children's books.... The proof necessary for plaintiff to establish the alleged conspiracies will be substantially the same or similar in each case.... To require that nine separate trials be conducted would cause the parties in each case to duplicate much of the proof as to liability. Consolidation, on the other hand, would be conducive to judicial economy and expedition of litigation....
>
> Defendants argue that the jury is likely to be confused if all nine cases are consolidated for trial, thereby prejudicing defendants' cases.... In particular, defendants contend that a different vertical conspiracy is alleged in each case, and

(Continued on next page)

The alternative offered by defendants would be separate trials for every plaintiff in many different jurisdictions. Each trial would involve litigation of the same issues on the same evidence with respect to the states and their numerous public agencies. Such a proposal would burden judicial resources far more than the consolidated trial of these class actions as structured by Judge Blumenfeld.

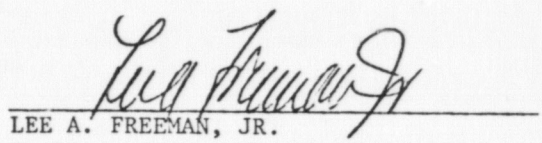
**/ (Continued from previous page)

> that a jury will be unable to keep each conspiracy separate from the others during deliberations. However, according to the amended complaints, there was an overall horizontal conspiracy which cut across each of the cases and the alleged individual vertical conspiracies. In addition, the system of alleged price fixing was the same in all nine cases. Thus it seems only proper to try the cases together, and to the extent defendants anticipate confusion, limiting instructions will be given to the jury.

CONCLUSION

For the foregoing reasons, this appeal should be dismissed. If the merits are reached, the rulings of the trial court should be affirmed.

Respectfully submitted,



LEE A. FREEMAN, JR.
Co-Liaison Counsel for Plaintiffs-Appellees

FREEMAN, FREEMAN & SALZMAN
One IBM Plaza - Suite 3200
Chicago, Illinois 60611
(312) 467-6540

DATED: September 19, 1975

H. LADDIE MONTAGUE, JR.
Co-Liaison Counsel for
Plaintiffs
1622 Locust Street
Philadelphia, Pennsylvania

WILLIAM J. SCOTT
Attorney General of Illinois
John P. Meyer
Special Assistant Attorney
General

THEODORE L. SENDAK
Attorney General of Indiana
John F. Beckman, Jr.
Special Assistant Attorney
General

FRANK J. KELLEY
Attorney General of Michigan
Edwin M. Bladen
Frederick H. Hoffecker
Assistant Attorneys General

WARREN R. SPANNAUS
Attorney General of Minnesota
Thomas R. Muck
Special Assistant Attorney
General

ROBERT P. KANE
Attorney General for the
Commonwealth of Pennsylvania
Gerry J. Elman
Deputy Attorney General

CHAUNCEY H. BROWNING, JR.
Attorney General of West
Virginia
Gene Hal Williams
Deputy Attorney General

BRONSON C. LA FOLLETTE
Attorney General of Wisconsin
Marvin I. Strawn
Assistant Attorney General

EVELLE J. YOUNGER
Attorney General of California
William S. Abbey
H. Chester Horn, Jr.
Deputy Attorneys General

CARL R. AJELLO
Attorney General of Connecticut
Norris L. O'Neill
Special Assistant Attorney
General

CURT T. SCHNEIDER
Attorney General of Kansas
Reid F. Holbrook
Special Assistant Attorney
General

WILLIAM F. HYLAND
Attorney General of New Jersey
Bruce R. Volpe
Deputy Attorney General

ADRIAN P. BURKE
Corporation Counsel of New York
Melvin L. Ortner
Assistant Corporation Counsel

LOUIS J. LEFKOWITZ
Attorney General of New York
John M. Desiderio
Joseph D. Landi
Assistant Attorneys General

WILLIAM J. BROWN
Attorney General of Ohio
Ronald I. Wiseman
Assistant Attorney General

APPENDIX "A"

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

IN RE:	)	
	)	M.D.L. Docket No. 45
MASTER KEY ANTITRUST LITIGATION	)	

DISTRICT OF	)	
	)	SS.
COLUMBIA	)	

AFFIDAVIT OF PETER MAX

I, PETER MAX, being duly sworn, state:

1. My name is Peter Max. I am Vice President of National Economic Research Associates, Inc., a firm of consulting economists. My resume including a summary of my background and experience in antitrust matters is attached hereto.

2. I have been requested by plaintiffs' counsel to comment, as an economist, on the question of injury related to the alleged conspiracy to fix and stabilize the prices of contract hardware and to maintain prices for contract hardware at inflated levels by agreeing to allocate customers and territories for master keyed jobs. For this purpose I am assuming the existence of conspiracy and further assuming that the conspiracy resulted in prices in excess of competitive levels.

3. I have read the affidavits of James McHugh and Richard Foley in this matter and rely upon the facts as set forth therein.

4. Under these facts, it is clear as a matter of economics that any overcharges in the price of contract hardware are borne by the plaintiffs and not by general contractors.

5. There are numerous reasons why the plaintiffs are the only injured parties.

6. Contract hardware is a material and as such is a cost item to general contractors.

7. All general contractors bidding on a project bid in reponse to a common set of specifications for finished hardware. Thereby each must incorporate quotations from hardware dealers for the same materials.

8. When a group of bidders all have a common cost element, such as in this instance, that cost element, in its entirety, will be incorporated by each in his bid. Any other course of action would be contrary to rational economic behavior.

9. If, between two bids on different projects, a general contractor receives quotations such that the second is, say, $1,000 higher than the first, he will increase his bid in the second case by $1,000 plus whatever percentage he deems required for markup and profit. He will not shrink his margin in the second case as a result of the higher cost for he will be using already that margin which he believes is both competitive and required by him as compensation for his risk and investment.

10. The reverse is also the case. If the cost of the general contractor decreases, this lower cost, in its entirety, will be incorporated in his bid with the commensurate markup for overhead and profit. A contractor will not increase his margin so long as he competes in a rational manner.

11. Thus, regardless of the level of cost for contract hardware quoted to a general contractor, that cost will be incorporated fully in his bid.

12. Consequently, all overcharges included in quotes to general contractors will be incorporated fully in their bids. Thus, all of the injury resulting from overcharges is sustained by the plaintiffs.

13. The aforementioned statement as made by me is true and correct according to my best knowledge and belief, and if called upon to testify in a proceeding concerning contract hardware, and specifically in the case of "In Re: Master Key Antitrust Litigation, MDL Docket No. 45," the statements made in this affidavit would be testified to by me.

Peter Max

PETER MAX

SUBSCRIBED and SWORN to before me this

19th day of April, 1973.

Notary Public

My commission expires: June 30, 1975.

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

IN RE:	)	
	)	M.D.L. Docket No. 45
MASTER KEY ANTITRUST LITIGATION	)	
STATE OF WISCONSIN	)	
	)	SS.
COUNTY OF DANE	)	

AFFIDAVIT OF WILLARD F. MUELLER

I, Willard F. Mueller, being first fully sworn state:

I am William F. Vilas Research Professor of Agricultural Economics, Professor of Economics and Professor in the Law School, University of Wisconsin, Madison, Wisconsin. I reside at 2135 Chamberlain Avenue, Madison, Wisconsin.

I have held my present position since August 1969. My major responsibilities include conducting research and teaching in the area of industrial organization and antitrust economics and law.

From 1961 until 1968 I served as Chief Economist and Director of the Bureau of Economics, Federal Trade Commission. In that capacity I served as chief economic advisor to the Commission and directed numerous economic studies dealing with problems of competition and monopoly, including measurement of the size of overcharges resulting from conspiracy and other practices.

During 1968-69 I was Executive Director of the President's Cabinet Committee on Price Stability. In this capacity I directed studies of the relationship between market power and inflation. These studies included estimates of the extent of price overcharges in the drug industry and in the electrical equipment industry.

During 1970-72 I served as an economic consultant and analyst in behalf of seven plaintiff states in the so-called "children's books"

case (Harper & Row et. al.). In this matter, I analyzed the magnitude of damages sustained by the plaintiff states as a result of an alleged conspiracy in the sale of library editions of children's books sold to public schools and libraries.

The essence of a price fixing agreement is that it causes buyers to pay a higher price "but for" the agreement. Obviously, the agreement results in a price "overcharge" that must be borne by the conspirators' customers.

Determination of which customers are injured by the overcharge, and by how much may become complicated when the price fixed product passes through two or more stages of a distribution-production channel. In this event a question arises as to which stage (or stages) in the channel bears the burden of the conspiratorial overcharge.

In situations where there are two stages in the distribution channel beyond the stage at which an overcharge occurs, we may visualize three alternative outcomes:

(1) The first stage passes on the entire overcharge to the second stage, which then bears the full burden of the overcharge.

(2) The first stage does not pass on any of the overcharge and therefore its price to the second stage remains unaffected by the conspiracy. In this case the first stage bears the full burden of the overcharge.

(3) The first stage absorbs part of the overcharge and passes on the remainder to the second stage. In this situation, the burden of the overcharge is shared by the two stages.

Economic theory does not give a clear cut answer as to which of the above situations will occur. As a generalization, economic theory predicts that sellers, under all competitive circumstances, take costs into account in making their production and selling decisions. As one leading theoretical textbook states, "Price formation begins with the

individual firm, whose pricing decisions turn primarily upon the demand for its product and the cost of producing it."[1/] Also, in the long run, (defined as a period long enough to permit a firm to adjust its operating capacity, etc., to fully reflect changes in cost and demand conditions), economic theory predicts that increases in cost will become reflected in higher prices. The precise extent of the increase will depend upon the demand for the final product. The more inelastic the demand, the greater will be the share of the overcharge passed on by an intermediary. Another factor determining whether an intermediary passes on all or part of an overcharge is its pricing policies. Empirical studies reveal that business firms frequently follow a "cost-plus" or a "fixed markup approach" in pricing.[2/] Briefly, under this approach businesses calculate their total average cost after which they apply a "customary" fixed markup. Firms following this policy are likely to pass on cost increases immediately.[3/]

The preceding illustrates that determination of whether or not a particular overcharge is passed on by an intermediary stage cannot be answered by resorting to economic theory alone, though theory may be helpful. An ultimate judgment on the question requires examination of

---

1/ Joe S. Bain, Price Theory, 1952, p. 126. Although this reference is to the situation where a firm is selling under competitive conditions, costs are also critical in noncompetitive markets. "For any seller the simple price output decision for a period can be conceived as resting on (1) the seller's demand curve for that period and (2) his cost curves appropriate to that period. The single firm monopolist's choice of a price and a rate of output, in either the short or long-run, follows the same logic as that developed for a seller in pure competition." Ibid., p. 198. For other expositions of the same concepts see, John F. Due and Robert W. Clower, Intermediate Economic Analysis, 1966 and C.E. Ferguson, Microeconomic Theory, 1969.

2/ Due and Clower, op. cit., p. 237.

3/ Due and Clower conclude that "When price is set on the basis of average cost, however, firms are likely to raise price immediately by the full amount of the cost increase." Ibid., p. 237.

the facts in a particular industry, especially determination of the industry's pricing policies and the nature of demand for its product.

I have therefore examined certain evidence in this case in arriving at certain conclusions as to whether the contractor passed on the alleged conspiratorial price overcharge in the sale of contract hardware. My review, which was based primarily on affidavits submitted by general building contractors, supports the following conclusions. In calculating bids for the construction of buildings for the State of Illinois, general building contractors proceed as follows:

(1) The contractor receives a quotation or bids on the finished hardware component of the general contract.

(2) In practice, all contractors receive the same quotas or bids (on the same projects) on such finished hardware.

(3) The general contractor includes the costs of the finished hardware component of the general contract as a single line item.

(4) The full cost of this line item is always included in the general contractor's bid. Therefore, the general contractor's bid varies in direct proportion to changes in the cost of finished hardware.

(5) Because of the above method of calculating bids, contractors pass on, in their general contract bids, any price changes for finished hardware on a dollar for dollar basis.

(6) In computing their bids, general contractors customarily apply a percentage markup to their total costs. The size of this markup is not affected by the prices they pay for the finished hardware component of the total costs upon which they apply their percentage markup.

Based on the preceding, we may infer that any overcharges paid for finished hardware components by general contractors are fully reflected in their bids on buildings for the State of Illinois. Moreover, because the percentage markup applied to costs by general contractors in calculating their bids are unaffected by the price of finished hardware, the full finished hardware overcharge is passed on to the State of Illinois plus

the contractor's percentage markup on the overcharge. In other words, if this percentage markup were 10 percent, for each $1 that the conspiracy increases prices to general contractors, the State of Illinois would pay an extra $1.10.

Additionally, because finished hardware components are essential parts of a building and represent a relatively small part of the total costs of a building, the demand for these components is very inelastic, i.e., the volume of purchases are not affected by price. When demand is very inelastic, increases in costs due to an overcharge will be passed on in full.

Finally, the most convincing evidence in the present case that the general contractor does in fact pass on the full overcharge to the final purchaser is that the general contractors disavow any personal injury from the overcharge. This clearly is a case where the burden of the overcharge is not shared by successive parties in the distribution channel. Rather, the general contractors pass on the full overcharge to the ultimate purchaser, the State of Illinois.

Affiant

Subscribed and sworn to
before me this ___ day
of _____, 1973.

Notary Public

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he caused the attached BRIEF OF PLAINTIFFS-APPELLEES to be served by first-class mail, postage prepaid, upon all counsel as provided by the Federal Rules of Appellate Procedure.

DATED: September 20, 1975

Lee Freeman Jr.

LEE A. FREEMAN, JR.